TAN SRI G DARSHAN SINGH A

v.

TETUAN AZAM LIM & PANG

COURT OF APPEAL, PUTRAJAYA B
ABDUL WAHAB PATAIL JCA
CLEMENT SKINNER JCA
AZIAH ALI JCA
[CIVIL APPEAL NO: W-02(IM)-567-03-2012]
6 JULY 2012 C

CIVIL PROCEDURE: *Contempt of court - Setting aside - Appeal against - Committal proceedings - Ex parte leave to commence committal proceedings - Non-disclosure of facts - Whether appellant failed to make full and frank disclosures - Whether learned judge erred in considering facts not disclosed to be material and relevant in setting aside ex parte leave- Rules of the High Court 1980, O. 52* D

CIVIL PROCEDURE: *Contempt of court - Leave to commence committal proceedings, ex parte - Setting aside - Appeal against - Non-disclosure of facts - Whether appellant failed to make full and frank disclosures - Whether learned judge erred in considering facts not disclosed to be material and relevant in setting aside ex parte leave - Rules of the High Court 1980, O. 52* E

The appellant appealed to this court against the decision of the High Court dismissing the appellant's notice of motion under O. 52 r. 3(1) of the Rules of the High Court 1980 (encl. 70) to commit the respondent/garnishee ('the garnishee') for contempt of court and allowing the garnishee's application to set aside the *ex parte* order pursuant to O. 52 r. 2(2) granting leave to commence committal proceedings. The appellant asserted that the learned judge had erred in law and in fact (i) in setting aside the *ex parte* application of the appellant for leave to commit the respondent and (ii) in holding that the appellant had failed to make full and frank disclosures. It was submitted by the appellant that the O. 52 statement contained sufficient information as to what the alleged breach was to enable the respondent to meet the allegations against it. The appellant thus prayed that the appeal herein be allowed. F G H I

Held (dismissing the appeal)

Per Abdul Wahab Patail JCA delivering the judgment of the court:

(1) Committal proceeding is criminal in nature since it involves the liberty of the alleged contemnor (*Tan Sri Dato (Dr) Rozali Ismail & Ors v. Lim Pang Cheong & Ors*, refd). Premised upon that, the law has provided procedural safeguards before a party is labelled as an alleged contemnor and committal proceedings allowed to be begun against him. Firstly, even though it is obtained *ex parte*, the law nevertheless required leave to be obtained to commence committal proceedings. Secondly, strict compliance is required. Thirdly, be it a civil or a criminal contempt, the standard of proof required is proof beyond reasonable doubt. (para 12 & 13)

(2) To enable the court to make a fair and just decision, it must necessarily have all the relevant facts before it. In an *ex parte* application, the applicant must set out the facts fairly, including the facts that are likely to be raised by the proposed alleged contemnor in objecting to the application if it were an *inter parte* application. If any fact is likely disputed by the other party, the applicant must say so and give his reasons why such dispute is not sustainable, or is irrelevant or immaterial. (para 15)

(3) The applicant's application was couched in terms that the respondents were holding the sum of money for the first defendant and that the appellant had obtained a judgment against the first defendant. The application neglected to mention that (i) although the first defendant commenced the development project, it had been taken over, with the agreement of all the purchasers except the appellant, by the second defendant (ii) that the second defendant had obtained an order under O. 18 r. 19 to strike out the claim by the appellant against it; (iii) the sum held by garnishee was the 5% retention held by the garnishee as a stakeholder and (iv) the sum held by garnishee was for the second defendant. (paras 9 & 10)

(4) The facts and the submissions before this court displayed an unrepentant defence of an *ex parte* leave obtained to commence committal proceedings without full and transparent disclosure of all relevant and material facts as would enable the court to make a fair and just judicial decision. Thus, the learned judge had not erred in considering the facts not disclosed to be material and relevant and setting aside the *ex parte* leave she had granted earlier. (para 17)

Bahasa Malaysia *Translation Of Headnotes*

Perayu telah merayu ke mahkamah ini terhadap keputusan Mahkamah Tinggi menolak notis usul di bawah A. 52 k. 3(1) Kaedah-Kaedah Mahkamah Tinggi 1980 (lampiran 70) mengkomitkan responden/garnisan ('garnisan') untuk penghinaan mahkamah dan membenarkan permohonan garnisan mengenepikan perintah *ex parte* di bawah A. 52 k. 2(2) memberi kebenaran memulakan prosiding komital. Perayu berhujah bahawa yang arif hakim telah khilaf dari segi undang-undang dan fakta-fakta (i) dalam mengenepikan permohonan *ex parte* perayu untuk kebenaran mengkomitkan responden dan (ii) dalam memutuskan bahawa perayu telah gagal membuat pendedahan yang penuh dan benar. Ia telah dihujahkan oleh perayu bahawa penyata A. 52 mengandungi maklumat yang memadai berhubungan perlanggaran yang didakwa supaya responden boleh menjawab dakwaan-dakwaan tersebut. Perayu oleh itu memohon supaya rayuan ini dibenarkan.

Diputuskan (membenarkan rayuan)
Oleh Abdul Wahab Patail HMR menyampaikan penghakiman mahkamah:

(1) Prosiding komital adalah bersifat jenayah kerana ia melibatkan kebebasan penghina. Berlandaskan premis itu, undang-undang menyediakan perlindungan prosedur sebelum sesuatu pihak dilabelkan sebagai penghina didakwa dan permulaan prosiding komital terhadapnya dibenarkan. Pertama sekali, walaupun ia telah diperolehi *ex parte*, undang-undang memerlukan kebenaran diperolehi untuk memulakan prosiding komital. Keduanya, pematuhan ketat diperlukan. Ketiga, tidak kira ia satu penghinaan sivil atau jenayah, standard pembuktian yang diperlukan adalah pembuktian melampaui keraguan munasabah.

(2) Untuk membolehkan mahkamah membuat keputusan yang adil, ia semestinya mempunyai semua fakta-fakta yang berkaitan di hadapannya. Di dalam permohonan *ex parte*, pemohon harus bentangkan fakta-fakta secara adil, termasuk fakta-fakta yang mungkin akan dibangkitkan oleh penghina yang didakwa dalam membantah permohonan jika ia permohonan *inter parte*. Jika ada fakta yang mungkin dipertikaikan oleh pihak yang lain, pemohon harus memberitahu dan memberikan alasan-alasan mengapa pertikaian tersebut tidak boleh dipertahankan, atau adalah tidak relevan atau penting.

(3) Permohonan pemohon diselaraskan dalam terma-terma bahawa responden memegang jumlah wang bagi pihak defendan pertama dan perayu telah memperolehi penghakiman terhadap defendan pertama. Permohonan gagal menyebut bahawa (i) walaupun defendan pertama memulakan projek pembangunan, ia telah diganti, mengikut persetujuan semua pembeli-pembeli kecuali perayu, oleh defendan kedua; (ii) bahawa defendan kedua telah memperolehi perintah di bawah A. 18 k. 19 untuk membatalkan tuntutan perayu terhadapnya; (iii) jumlah yang dipegang oleh garnisan adalah 5% pengekalan yang dipegangnya sebagai pemegang amanah; dan (iv) jumlah yang dipegang garnisan adalah untuk pihak defendan kedua.

(4) Fakta-fakta dan hujahan-hujahan di hadapan mahkamah ini memaparkan pembelaan kebenaran yang diperolehi *ex parte* untuk memulakan prosiding komital tanpa pendedahan penuh dan telus fakta-fakta yang relevan dan penting untuk membolehkan mahkamah membuat keputusan yang adil. Oleh itu, yang arif hakim tidak khilaf apabila beliau mempertimbangkan fakta-fakta yang tidak didedahkan itu sebagai penting dan relevan lalu mengenepikan kebenaran *ex parte* yang telah diberi beliau sebelum ini.

Case(s) referred to:

Tan Sri Dato' (Dr) Rozali Ismail & Ors v. Lim Pang Cheong & Ors [2012] 2 CLJ 849 FC ***(refd)***

Legislation referred to:

Housing Development (Control and Licensing) Act 1966, s. 7A(7)

Rules of the High Court 1980, O. 18 r. 19, O. 49 rr. 5, 6(1), O. 52 rr. 2(2), 3(1)

For the appellant/plaintiff - Harpal Singh (Navinder Singh with him); M/s Darshan, Syed, Amarjit & Partners
For the respondent/garnishee - M Pathmanathan (Foo Joon Liang & Shirin Pathmanathan with him); M/s Gan Partnership

[Appeal from High Court, Kuala Lumpur; Civil Suit No: S6-22-1040-2007]

Reported by Suhainah Wahiduddin

JUDGMENT

Abdul Wahab Patail JCA:

[1] The appellant Tan Sri Darshan Singh appealed to this court against the decision of the High Court on 10 February 2012 where that court:

(a) Dismissed the appellant's notice of motion under O. 52 r. 3(1) of the Rules of the High Court 1980 at encl. 70 to commit the respondent/garnishee (hereinafter the garnishee) for contempt of court; and

(b) Allowed the garnishee's application at encl. 73 to set aside the *ex parte* order at encl. 69 pursuant to O. 52 r. 2(2) made on 23 November 2011 granting leave to commence committal proceedings.

The Memorandum Of Appeal

[2] In his memorandum of appeal, the appellant asserted that the learned judge erred in law and in fact as follows:

(a) In setting aside encl. 69 which is the *ex parte* application of the appellant for leave to commit the respondent.

(b) In holding that the plaintiff had failed to make full and frank disclosures.

(c) When after having granted the leave to apply for an order of committal in encl. 69, ought to have considered the merits of the committal application in encl. 70 (*inter parte* notice of committal).

(d) In failing to consider:

(i) That the respondent had, by affidavit sworn by Lim Chong Leong on 5 December 2008, confirmed that a sum of RM703,160.30 was held by the respondent as stakeholder sum.

(ii) The letter from the Ministry of Housing and Local Government dated 8 December 2011 that confirms all the stakeholder sums pertaining to the said 1st judgment debtor as the developer for the said Housing Project.

(iii) That the respondent had released the stakeholder sums to the 2nd judgment debtor after the appellant had served the Garnishment Order To Show Cause dated 9 September 2008 (hereinafter referred to as "the said Garnishment Order") on the respondent.

(iv) The respondent's letter dated 13 May 2011 which confirms the stand taken by the respondent in releasing the stakeholder sums to the 2nd judgment debtor.

(v) That the respondent ought to have retained sufficient sum out of the Garnishment Sum to satisfy the appellant's judgment dated 24 January 2008.

(vi) That the 2nd judgment debtor had filed an intervener application dated 28 October 2008 to intervene in the Garnishee Proceedings and which the 2nd judgment debtor later withdrew the said application after receiving the stakeholder sums from the respondent and before the conclusion of the Garnishee Proceedings.

(vii) That the respondent ought to have sought the directions of the court pursuant to O. 49 r. 5 and 6(1) of the Rules of the High Court 1980 in the Garnishment Proceedings itself before releasing the Garnishment Sum to the 2nd judgment debtor who had already filed an intervener application against the Garnishment Sum.

(e) In considering irrelevant facts and failing to consider relevant facts.

The Submissions For The Appellant

[3] The written submission for the appellant began with a brief introduction and then proceeded to the merits of the appeal, principles of appellate interference, background facts, nature of encl. 70, reasons why the appeal should be allowed before proceeding to conclusions where it was submitted:

> 35. It is respectfully submitted that the Appellant had made full and frank disclosure as the Order 52 Statement contained sufficient information as to what the alleged breach was to enable the Respondent to meet the allegations against it.
>
> 36. ... it is pertinent to note that in *Chandra Sri Ram v. Murray Hiebert* [1997] 3 MLJ 240 at p. 253 para G (TAB-14) the Court held: ... Further, the Court went on to adopt Lord Woolf MR's judgment in *Nicholls v. Nicholls* [1997] 147 NLJ 61 ...
>
> 37. Based on the above, it is therefore respectfully submitted that the Learned Judge erred in law and fact in dismissing the *ex-parte* Order for leave to commit the Respondent at the hearing of Enclosure 70.
>
> 38. By reason of the matters submitted above, the Appellant respectfully pray that the Appeal be allowed with costs.

[4] It is obvious that the appeal in respect of the dismissal of the appellant's notice of motion need to be considered only if the appellant's appeal against the setting aside of 23 November 2011 *ex parte* order is allowed.

[5] On 31 May 2012, Dato' Harpal Singh Grewal began quite properly before us to deal with setting aside of the *ex parte* order first.

Reasoning And Conclusion

[6] The learned judge, who sat in the court that granted the *ex parte* leave, heard the *inter parte* application by the alleged contemnor to set aside the *ex parte* leave. She set out her grounds concisely as follows:

A 2. Having heard the parties and having perused the cause papers and written submission of the parties I find that the plaintiff has failed to make full and frank disclosures. The stakeholder sum is not a debt due to the 1st defendant that can be garnished by the plaintiff. The stakeholder sum is not a sum "due or accruing due" to the 1st defendant.

B

3. The plaintiff has failed to prove its allegation set out in the O. 52 statement beyond a reasonable doubt.

[7] The language is not strictly confined to the purposes of the C application to set aside the *ex parte* order because, as para. 3 shows, the judgment dealt with the appellant's notice of motion to commit the garnishee also. It is clear however in para. 2 that the court would not have granted the *ex parte* leave if the facts not disclosed by the appellant but subsequently put before the D learned judge, had been disclosed by the appellant earlier.

[8] We examined the grant of leave to commence committal proceedings to see if the learned judge was right to do so.

[9] The appellant's application was couched in terms that the E respondents were holding the sum of money for the 1st defendant and that the appellant as plaintiff had obtained a judgment against the 1st defendant.

[10] The application neglected to mention that:

F

(a) Although the 1st defendant commenced the development project, it had been taken over, with the agreement of all the purchasers except the appellant, by the 2nd defendant;

(b) the appellant had sued the 1st and the 2nd defendant;

G

(c) the 2nd defendant had taken over the failed development from the 1st defendant;

(d) the 2nd defendant had obtained an order under O. 18 r. 19 to strike out the claim by the appellant against it;

H

(e) the sum held by garnishee is the 5% retention held by the garnishee as stakeholder; and

(f) the sum held by garnishee was for the 2nd defendant.

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[11] These facts are relevant and material for the principal reasons that:

(a) under s. 7A(7) of the Housing Development (Control and Licensing) Act 1966 Act 118 which provides that such monies held by the stakeholder shall not be garnished until all liabilities and obligations of the licensed housing developer under the sale and purchase agreements in respect of the housing development have been fully discharged and fulfilled; and

(b) the monies were held by the garnishee as stakeholder to be returned, not to the 1st defendant, but to the 2nd defendant in the event no claims are made or there remained a balance.

[12] Order 52 r. 2(2) provides that an application for leave to commence committal proceedings must be made *ex parte* to the court, except in vacation when it may be made to a judge in chambers, and must be supported by a statement setting out the name and description of the applicant, the name, description and address of the person sought to be committed and the grounds on which his committal is sought, and by an affidavit, to be filed before the application is made, verifying the facts relied on.

[13] It has been held by the Federal Court in *Tan Sri Dato' (Dr) Rozali Ismail & Ors v. Lim Pang Cheong & Ors* [2012] 2 CLJ 849 FC that it is settled law that committal proceeding is criminal in nature since it involves the liberty of the alleged contemnor. Premised upon that, the law has provided procedural safeguards before a party is labelled as an alleged contemnor and committal proceedings allowed to be begun against him. Firstly, even though it is obtained *ex-parte*, the law nevertheless required leave to be obtained to commence committal proceedings. Secondly, strict compliance is required. Thirdly, be it a civil or a criminal contempt, the standard of proof required is proof beyond reasonable doubt.

[14] Strict compliance not only means that the applicant is bound by the mandatory statement under O. 52 r. 2(2), but it was also held in *Tan Sri Dato' (Dr) Rozali Ismail & Ors v. Lim Pang Cheong & Ors* that:

> [36] The safeguards in r. 2(2) entail the application to be supported by a statement describing amongst others, the person sought to be committed and the grounds on which he is alleged to be in contempt. It must be supported by an affidavit verifying the facts relied on in the statement.

A [37] We wish to state in clear term that the alleged act of contempt must be adequately described and particularized in detail in the statement itself. The accompanying affidavit is only to verify the facts relied in that statement. It cannot add facts to it. Any deficiency in the statement cannot be supplemented or cured by any further affidavit at a later time. The alleged contemnor must at once be given full knowledge of what charge he is facing so as to enable him to meet the charge. This must be done within the four walls of the statement itself. The same approach was taken by the Supreme Court in *Arthur Lee Meng Kwang case, supra*. (See also *Sykt M Mohamed v. Mahindapal Singh Joginder Singh & Ors* [1991] 1 CLJ 582; [1991] 4 CLJ (Rep) 16.)

[15] It must also be borne in mind that the application for leave to commence committal proceedings is made *ex parte*. To enable the court to make a fair and just decision, it must necessarily have all the relevant facts before it. In an *ex parte* application, it means the applicant must set out the facts fairly, including the facts that are likely to be raised by the proposed alleged contemnor in objecting to the application if it were an *inter parte* application. If any fact is likely disputed by the other party, the applicant must say so and give his reasons why such dispute is not sustainable, or is irrelevant or immaterial. There is no reason not to be able to do so for after all only the applicant has the opportunity to be heard upon it in the *ex parte* application. It certainly does not mean the applicant is entitled to merely state the facts favouring his application and the court must rely on that alone. Otherwise the leave procedure would cease to be a safeguard and instead easily become a tool exploited for oppression.

[16] Dato' Harpal Singh Grewal submitted all these are irrelevant for the fact remains that notwithstanding that the order was issued by the court on 9 September 2008, the respondent garnishee ignored that order and released the money to the 2nd defendant on 13 September 2008. We do not agree. It is effectively a submission that never mind how the leave was obtained, and how misled the court was as to the basis upon which leave to commence committal proceedings was granted, the committal proceedings must be allowed to be proceeded with against the respondent/garnishee for releasing the moneys to the 2nd defendant. The argument is without any merit. Any question

whether the *ex parte* leave to commence committal proceedings was wrongly obtained must be dealt with first since it is the foundation in the process of committal proceedings. Two wrongs do not make a right. A court of law will not lightly allow its processes to be abused. If the process of the court was wrongly used to obtain the *ex parte* order for leave, that leave will be set aside first.

[17] The facts and the submissions before this court display an unrepentant defence of an *ex parte* leave obtained to commence committal proceedings without full and transparent disclosure of all relevant and material facts as would enable the court to make a fair and just judicial decision. The evidence shows the appellant to be a purchaser

(a) from the 1st defendant who was unable to complete the building development,

(b) who, unlike other purchasers, refused

(i) to forgo his claim to liquidated and ascertained damages against the 1st defendant, and

(ii) to sign the tri-partite agreement with the 1st and the 2nd defendant;

and in

(c) having refused to recognise the 2nd defendant who completed the development, and

(d) maintaining his claim, obtained judgment against the 1st defendant as judgment debtor;

now

(e) seeks payment, after setting off final payments, from the respondent/garnishee who was holding the money as stakeholder not for the said judgment debtor but for the 2nd defendant.

[18] In the circumstances, we find that the learned judge had not erred in considering the facts not disclosed to be material and relevant and set aside the *ex parte* leave she had granted earlier. Obviously, the non-disclosure led her to granting leave she would

otherwise not have granted. She displayed considerable discretion in keeping her judgment to four short paragraphs when she could have said much more.

[19] Accordingly, we dismissed the appeal in respect of the setting aside of leave to commence committal proceedings. With that the appeal against dismissal of the appellant's application to commit the respondent/garnishee for contempt necessarily fails. We dismissed that appeal also. We fixed costs in the lump sum of RM10,000. We ordered the deposit be refunded so that the respondent may receive a lump sum payment of costs from the appellant without having to expend further time and effort to collect the deposit towards account of costs.